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SHOULD THE REVIEW OF A CASE TRIED BY A JURY UNDER § 10 OF THE NATIONAL FOOD AND DRUGS ACT BE BY WRIT OF ERROR OR APPEAL?

Section 10 of the National Food and Drugs Act provides, among other things:

> "The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in such case."

An appeal is the only mode of reviewing causes in admiralty and maritime jurisdiction. Regulations respecting writs of error do not apply. (San Pedro 2nd, Wheaton 132.) If the proceeding under § 10 is a proceeding in admiralty there can be no question that the only method of review is by appeal, whether the case is heard and determined by the court alone, or whether the issues of fact joined in the case are tried by a jury for in admiralty there are certain cases of tort and contract where jury trials are had, and in all such cases the review is by appeal. Boyd *v.* Clark, 13 Fed. Rep. 908. It has been held, however, that cases arising under this section are not admiralty cases, and are not made so by the provision of said section that the proceedings shall conform, as near as may be, to proceedings in admiralty. In the case of United States *v.* George Spraul & Co., claimants in 275 cases of tomato catsup arising under this section and decided on appeal March 7, 1911, by the United States Circuit Court of Appeals for the Sixth Circuit, it was held that the proceeding was not one in admiralty; that the Food and Drugs Act merely provides for conformity in all proceedings for confiscation thereunder as near as may be to the proceedings in admiralty, and that in cases of seizures on land the District Court proceeds, not as a court of admiralty, but as a court of common law upon a trial by jury.

The Circuit Court of Appeals of the 8th Circuit in the case

of United States *v.* 779 Cases of Molasses, 174 Fed. Rep. 325, held that cases arising under Section 10 were not admiralty or maritime cases, and that, therefore, the method of review, when the case was heard by a jury, was controlled by the following provision of Article 7 of the amendments of the Constitution:

> "No fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

This was a case which arose under the aforesaid section of the Food and Drugs Act and which was tried by a jury. There was a judgment for claimant on directed verdict and the United States carried the case up by appeal. In affirming the judgment of the lower court, the Court of Appeals said:

> "The right to trial by jury granted by this Act on demand of either party is absolute and means a trial by jury according to the established practice in courts of common law."

After citing authorities and the above provision of the Constitution, together with a statement of Mr. Justice Clifford in the case of Insurance Company *v.* Comstock, 16 Wall. 258, the court said further:

> "As a jury trial was demanded by the claimant in this case and as such trial was had, the appeal taken * * * must be dismissed, because such method is inappropriate to review the proceedings had."

The case of Armstrong Foundry, 73 U. S. 766, involved, among other things, the method of the review of the judgment of the District Court under the Confiscation Statutes passed by Congress August 6, 1861. The Act provided that:

> "Such prizes and captures shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which they may be seized or in which they may be taken," etc.

The property involved belonged to John Armstrong and it was sought to confiscate it on the ground that it had been used with his knowledge and consent in aid of the rebellion. Armstrong pleaded the amnesty offered by President Lincoln and his acceptance of it in compliance with the terms. His plea was rejected and a decree of condemnation was rendered.

From this final judgment the case was appealed to the Supreme Court of the United States. In reversing the lower court and remanding the case for a new trial the court said:

> "The proceedings below related to a seizure of land, and though being conducted under the statute in the form of admiralty, must be regarded as a case of common law jurisdiction, a final decision in which can only be reviewed here on a writ of error."

The court further directed that in a further trial the proceedings should conform, in respect to trial by jury, and exceptions to evidence, to the course of the common law.

The confusion in the decision of the courts relative to appellate review of cases of the character under consideration and the manifest error of the court in the case of U. S. *v.* 779 Cases of Molasses, supra, have resulted from a failure to take into consideration the provisions of the Constitution under which Congress has assumed to act in a given case. Article 3, § 1, of the Constitution, provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. In the establishment of courts under this provision it is within the power of Congress to prescribe the jurisdiction and the methods of practice and procedure therein, except in so far as other provisions of the Constitution limit the powers of Congress in those respects. For example, Congress in establishing the circuit and district courts of the United States was free to prescribe their jurisdiction, but as to the method of the trial of controversies in such courts we find in Article 7 of the Constitution this limitation upon the power of Congress, namely:

> "*In suits at common law* where the value in controversy should exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

When we come to interpret this provision resort must be had to the judicial system of England at the time of the adoption of the Constitution, for the reason that the language and terms of our Constitution are those of the common law of England—

the rule of construction being that Constitutions themselves being instruments in the nature of reenactments of an acknowledged system of principle coeval with a part of the common law itself and subject to judicial interpretation from their inception, it necessarily follows that the definitions of terms used in constitutions and statutes are to a great extent to be found in the common law and in the common usage and understanding of those terms according to the institutions of the country in which they originated and were brought into use in the administration of government. "Suits at common law," as used in the aforesaid Article, have been held to include not merely modes of proceeding known to the common law, but all suits not of equity or admiralty jurisdiction in which legal rights are settled and determined. And, also, that "suits at common law, as used in the clause of the Constitution, providing that the right of trial by jury shall be preserved in suits at common law, means suits in which legal rights are to be ascertained and determined in contradistinction where equitable rights alone are recognized and equitable remedies administered, or where, as in admiralty, mixture of public law or maritime law and equity was often found in the same suit." (Words and Phrases Judicially Defined, vol. 7, p. 6078.)

It may be noted here, parenthetically, that the Court in the case of U. S. *v.* Spraul & Co., supra, failed to quote all of Article 7 of the Constitution, and lost sight, apparently, of the fact that the method of review was limited to *suits at common law.*

The case of Armstrong's Foundry, supra, is a striking illustration of the failure of Congress itself to recognize the constitutional limitations upon its power in conferring jurisdiction upon the district courts and providing for their procedure in what is known as the "Confiscation Statutes." It was provided in these statutes that property seized thereunder might be condemned in admiralty in any district in which it may be seized, etc., and it was undoubtedly the intention of Congress that the procedure in these cases should be in conformity with the practice and procedure in admiralty. This was clearly beyond the power of Congress under Article 7 of the Constitution, for the reason that the liability of the property to condemnation was

made to depend upon its use for insurrectionary purposes, *with the consent of the owner*. The owner was a necessary party to this proceeding and it, therefore, had all of the requisites of a suit at common law and should have been tried by a jury, and was therefore, only reviewable by an appellate court on writ of error. The purpose of the Confiscation Statutes was not to punish the property *per se* used in aid of the rebellion but the owner thereof for consenting to its use for such purpose, and the forfeiture was in the nature of a penalty by way of punishment of the owner, and the proceeding was in reality *in personam, though in rem* in form. The Supreme Court of the United States, therefore, very properly in this case reversed the lower court and remanded the case with directions to allow a new trial, the proceedings in which should be conformed, in respect to trial by jury and exceptions to evidence, to the course of the common law.

Chief Justice Marshall, in the case of McCulloh *v.* Maryland (4 Wheat. at p. 420), laid down the following rule as to the construction of the powers of Congress under the Constitution:

> "We admit, as all must admit, that the powers of the Government are limited and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the Constitution, and by means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.*"

The acts of Congress providing for the exclusion and deportation of Chinese persons found in the United States have often been contested as transcending the constitutional power of Congress on many grounds, and, among others, that they were on contravention of the provisions of Article 6 of the Constitution. Their validity, however, has been sustained in innumerable decisions of the Supreme Court and on the ground that their enactment was a legitimate exercise of the powers of

Congress to which these provisions of Article 6 did not apply. In the case of Fong Yue Ting *v.* United States (149 U. S. 548), it was held that the right to exclude or expel aliens or any class of aliens absolutely or upon certain conditions in war or in peace is an inherent and inalienable right of every sovereign and independent nation, that in the United States the power to exclude or expel aliens is vested in the political departments of the national government and has to be regulated by treaty or act of Congress and be executed by the executive authorities according to the regulations so established, except so far as the judicial department is authorized by treaty or by statute or is required by the Constitution to intervene. The court said further in this case (p. 715), quoting the words of Mr. Justice Curtis in Murray *v.* Hoboken Co. (18 How. 272, 284):

> "To avoid misconstruction of so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which from its nature is the subject of a suit at the common law or in equity or admiralty; when on the other hand can it bring under the judicial power a matter which from its nature is not a subject for judicial determination. At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

And it might be added that in all such matters involving public rights, in which Congress confers jurisdiction upon the courts, it has the power to at the same time to prescribe the methods of procedure for adjudication and determination of any question at issue therein. Congress has in many instances conferred jurisdiction upon executive authorities to hear and determine without the intervention of a jury questions concerning the public revenues, and such proceedings have never been considered suits at common law, and therefore are not within the provisions of Article 7 of the Constitution. We find statutes, for example, providing for the recovery of duties illegally exacted on imports and giving the final determination of such claims to the Secretary of the Treasury, and at the present time there is

a statute which provides for the determination of such questions by a Board of General Appraisers, and which allows the decisions of that Board to be reviewed by the courts in such particulars only as may be prescribed by law.

The Food and Drugs Act was passed by Congress under that provision of the Constitution authorizing it "to regulate commerce with foreign nations and among the several states and with Indian Tribes." The statute declares that it is one "for preventing the transportation of adulterated foods and for regulating traffic therein." As was said by the Supreme Court in the case of the United States *v.* The Hipolite Egg Company, decided on March 3, 1911:

> "Statutes rest, of course, upon the power of Congress to regulate interstate commerce, and defining that power we have said that no trade can be carried on between the states to which it does not extend, and have further stated that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles which the law seeks to keep out of commerce because they are debased by adulteration, and which punishes them (if we may so express ourselves) and the shipper of them. * * * The power to do so is certainly appropriate to the right to debar them from interstate commerce and completes its purpose which is not to prevent merely the physical movement of adulterated articles but the use of them too—to prevent trade in them between the states by denying to them the facilities of interstate commerce. An appropriate means to that end which we have seen is legitimate are the seizure and condemnation of the articles at their point of destination in the original unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution."

Notwithstanding the fact that Congress provided in § 566 of the Revised Statutes for trial by jury in admiralty cases arising on the Lakes, it was held that this did not alter the method of appellate review in admiralty cases. In the case of Boyd *v.* Clark (13 Fed. Rep. 908), the court held that admiralty cases arising upon the Lakes and tried by jury pursuant to Revised Statutes, § 566, are not reviewable upon writ of error but may

be re-examined upon appeal in the circuit court. This case was carried up by writ of error which was dismissed. The court said:

> "The fact that the case was tried by a jury makes no difference in determining the remedy to which the defeated party is entitled. Even if the seventh Amendment to the Constitution, providing that no fact tried by a jury should be otherwise re-examined in any court of the United States than according to common law, applied to any other than common law cases, it is silent in respect to appeals upon matters of law. The rulings of the district courts upon questions of law would still be subject to review."

This being an admiralty case, the provision of § 7 of the Constitution in regard to suits at common law did not apply, and therefore the facts as well as the law was subject to review by the appellate court on appeal. The court expressed no opinion as to whether the jury allowed in this class of admiralty cases is intended to be more than advisory to the district court as are juries in chancery cases. The proceeding under § 10 of the Food and Drugs Act is a civil proceeding *in rem* against the product, which Congress in the exercise of its power to regulare commerce has declared to be contraband and outlawed. It has none of the characteristics of a suit at common law. The proceeding is not against any person in any respect even though a claimant intervenes. Intervention is within the judicial discretion of the court, and when a claimant is permitted to intervene his liability for costs is solely because he stipulates for its payment as a condition and consideration for being permitted to intervene in the proceeding. The fact that the statute authorizes a jury, when demanded, does not alter the nature of the proceeding or make it a suit at common law, any more so than jury trials in admiralty cases arising on the Great Lak s changes the essential character of such proceedings or makes them suits at common law. There can be no question that the Food and Drugs Act is within the scope of the constitutional powers of Congress, that the end aimed at by it is legitimate, and that, therefore, the means which are deemed by Congress appropriate to make effective the enforcement of this law and are plainly adapted to that end, are as much within the constitutional

power of Congress as the law itself. Congress evidently considered that a procedure in conformity to proceedings in admiralty was the best and most effective method for the enforcement of this Act. This was a question of legislative policy to be determined by Congress and when once determined to be respected and enforced by the courts. If it should be held that cases tried under this section without the intervention of a jury can only be reviewed on writ of error, the result will be to restrict the proceedings in conformity with those in admiralty to the trial of the case in the lower court, and would also result in a denial of the right to review in many cases for the reason that the only questions involved are questions of fact, and they cannot be taken up for review by writ of error as that writ brings up for determination solely questions of law. It cannot be reasonably contended that Congress intended any such construction to be put upon this section, but on the contrary that in seeking a review of the decision of the court where a case is tried under this section with or without the intervention of a jury, that the review should be by appeal in conformity with the practice in admiralty cases.

The appropriateness of reviewing by appeal a judgment of the court under this section where there has been no trial by jury and the questions at issue are those of fact and not of law becomes at once apparent when we consider the method of the court of review on appeal in conformity with appeals in admiralty. An appeal in admiralty brings into the circuit court of appeals the record of the case in the district court. It is regularly heard on the pleadings and evidence in the district court unless the circuit court of appeals otherwise orders. The pleadings may be amended and new evidence taken in the circuit court by leave of that court. There is a new trial in the circuit court of appeals on an appeal in admiralty in this sense that the court will *review the law and the facts* from the record before the district court, together with such new pleadings and evidence as may be permitted in the appellate court.

The Act of February 16, 1879, limiting the power of the Supreme Court to questions of law only does not apply to appeals taken to the circuit court of appeals. It should be stated, however, that notwithstanding this right of retrial the rule

prevails that the judgment of the district court will not be reversed when the result depends alone upon questions of fact depending upon conflicting evidence, unless there is a decided preponderance against the judgment, where the trial judge saw and heard the witnesses and had an opportunity of weighing their intelligence and candor.

From what has been said it is manifest that the Food and Drugs Act is within the constitutional powers of Congress under the interstate commerce clause of the Constitution, and that it was also within the power of Congress to adopt whatever method of procedure it saw fit for the enforcement of said law, which was appropriate to the ends and not expressly prohibited by the Constitution. It is further manifest that Congress did not intend that the procedure in analogy to proceedings in admiralty should be confined to the trial in the lower court but that such procedure should also be applicable in seeking a review of the judgment of the lower court and that the most appropriate method for that purpose is by appeal as in admiralty, for otherwise there would be no satisfactory method of reviewing an erroneous decision of the lower court on the facts when questions of fact only and not questions of law were at issue.

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